

**UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA**

---

**MAG. NO. 10-739-11**

---

**UNITED STATES OF AMERICA,**

**Petitioner,**

**v.**

**DANIEL CHOI,**

**Respondent.**

---

**PETITION FOR WRIT OF MANDAMUS  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

**RONALD C. MACHEN JR.,  
United States Attorney.**

**ROY W. McLEESE III,  
GILBERTO GUERRERO,  
ANGELA S. GEORGE, DC BAR #470567,  
Assistant United States Attorneys.**

**555 4th Street, NW, Room 4444  
Washington, DC 20530  
(202) 252-7758**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|                                        |   |                                 |
|----------------------------------------|---|---------------------------------|
| <b>UNITED STATES OF AMERICA</b>        | : |                                 |
|                                        | : | <b>Magistrate No. 10-739-11</b> |
|                                        | : |                                 |
| v.                                     | : |                                 |
|                                        | : |                                 |
| <b>DANIEL CHOI,</b>                    | : |                                 |
| <b>Defendant</b>                       | : |                                 |
| <hr style="width:40%; margin-left:0"/> | : |                                 |

**GOVERNMENT’S PETITION FOR WRIT OF MANDAMUS**

**PRELIMINARY STATEMENT**

Defendant Daniel Choi is charged by criminal complaint with failure to obey a lawful order, pursuant to 36 C.F.R § 2.32(a)(2) (2011). On November 15, 2010, during a “Don’t Ask, Don’t Tell” (DADT) demonstration in front of the White House, the defendant and 12 others handcuffed themselves to the White House fence and refused to leave the area in response to three orders given by the United States Park Police (U.S.P.P.).<sup>1</sup> All 13 protestors were arrested and charged in the United States District Court for the District of Columbia with failing to obey a lawful order. Despite the fact that this was defendant Choi’s third arrest in nine months for failing to obey a lawful order to leave the area after handcuffing himself to the White House fence during a DADT protest, each of the protestors, including defendant Choi, were offered the opportunity to resolve his or her case through a deferred-sentencing agreement (DSA). Under the DSA that was offered, in return for pleading guilty to the charge of failure to obey a lawful order, the government agreed to dismiss each of the protestors’ cases if, for a four-month period, each refrained from being arrested upon probable

---

<sup>1</sup> If convicted, the defendant faces up to six months in jail and a maximum fine of \$500. 36 C.F.R. § 1.3 (2011) and 16 U.S.C. § 3 (2011). Pursuant to 18 U.S.C. §§ 19 and 3559, this offense is a Class B misdemeanor, a petty offense. Thus, the defendant is not entitled to a jury trial, and he may be tried before a United States Magistrate Judge (USMJ) in a bench trial.

cause and complied with all other conditions set by the magistrate court. All of the protestors except for defendant Choi accepted the DSAs, and the government is today filing motions to dismiss their cases.

A few days before trial was to begin, the United States again attempted to reach a resolution of the case with defendant Choi by offering him a deferred-prosecution agreement (DPA) under which, if he were to refrain from being arrested upon probable cause and comply with all release conditions set by the magistrate court for a period of four months, the government would dismiss the criminal complaint. Choi declined this offer.

Trial commenced before United States Magistrate Judge John M. Facciola on August 29, 2011. The week before trial began, the Assistant United States Attorney assigned to this case, Angela George, became aware through a telephone conversation with defense counsel that the defendant might seek to assert a selective-prosecution claim based on dissimilar treatment between the defendant and members of the public who spontaneously gathered outside the White House the night that President Barack Obama announced that Osama bin Laden had been killed. Because there is no indication that these revelers handcuffed themselves to the White House fence or refused to obey a lawful order, and because “[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution,” United States v. Armstrong, 517 U.S. 456, 463 (1996), the United States filed a pretrial motion in limine to preclude the defense from raising this selective-prosecution claim during the trial (App. A at 7-12).<sup>2</sup> The government argued that the defendant had waived a selective-prosecution claim by failing to raise it in a pretrial motion to dismiss the

---

<sup>2</sup> “App.” refers to the Appendix of pertinent record materials filed with this petition.

complaint, pursuant to Rule 12(b)(3)(A) & (b)(3)(E) of the Federal Rules of Criminal Procedure, and that he therefore should be precluded from eliciting evidence regarding selective prosecution at trial (App. A at 7-8). The government also argued that the defendant had proffered no evidence that the defendant was singled out for prosecution from among others who were similarly situated, nor had the defendant proffered any evidence of discriminatory intent (App. A at 9-10).

Before trial began on the morning of August 29, the prosecutor asked for a ruling on the in limine motion, again arguing that a claim of selective prosecution is not a trial defense and, if raised by the defendant, should be addressed pretrial (8/29/11 a.m. Tr. 4-5). The magistrate court declined to rule on the motion, and directed the prosecutor to call her first witness (*id.* at 5). The magistrate court thereafter allowed the defense to elicit testimony from U.S.P.P. witnesses purportedly in support of a claim of selective prosecution and, on August 31, 2011, sua sponte indicated that a prima facie case of selective prosecution had been made out (8/31/11 a.m. Tr. 8). The USMJ later clarified that he viewed the issue as one of vindictive prosecution rather than selective prosecution, based on the fact that Choi had been prosecuted in federal court after his November 15, 2010, arrest, but had not been prosecuted federally after either of his two earlier arrests, which occurred in March and April of 2010 (8/31/11 p.m. Tr. 2-3). According to the USMJ, this raised the inference that the instant prosecution was based on the nature of Choi's speech (*id.* at 3). The USMJ also stated that he would allow the defense to pursue this claim of vindictive prosecution as a trial defense (*id.*).

Although this petition is being brought because of the magistrate court's legal error in considering selective and vindictive prosecution as defenses to the charge of failure to obey a lawful order, the United States Attorney's Office also strongly disagrees that any claim of selective or vindictive prosecution can be made out in this case. Defendant Choi has yet to offer any evidence

that he was treated differently than any person who has handcuffed himself to the White House fence and refused to obey a police order to leave. There is no indication that the members of the public who celebrated the death of Osama bin Laden outside the White House and were not arrested had ever chained themselves to the White House fence. The people most similarly situated to Choi are the 12 others with whom he was arrested, each of whom were charged with the same offense as Choi, and each of whom entered into the same DSA that was offered to Choi. Indeed, the DPA that the government later offered to Choi was more favorable than a DSA because it did not require Choi to plead guilty.

Nor is there any merit to the magistrate court's preliminary finding of a prima facie case of vindictive prosecution. The fact that Choi was arrested in March and April based on the same conduct that led to his arrest in November, but was not prosecuted in federal court on either of the two previous occasions, does not raise the inference that he was prosecuted vindictively based on the nature of his speech.<sup>3</sup> Each arrest was made during a DADT protest, in which the subject matter of the protest was the same. It is well within the broad discretion afforded the prosecutor to bring any charges for which probable cause exists against a person who has three times in nine months engaged in the same illegal conduct.

The government seeks a writ of mandamus because the magistrate court clearly erred by: (1) failing to rule on the government's motion in limine seeking to preclude evidence of selective prosecution where the defense had filed no motion under Rule 12(b)(3)(A); (2) permitting the defense to pursue selective prosecution as a defense to the charge of failing to obey a lawful order

---

<sup>3</sup> This is particularly true given the fact that the March and April prosecution decisions were made by the D.C. Office of Attorney General rather than the U.S. Attorney's Office.

at trial; and (3) sua sponte raising vindictive prosecution as a defense to the criminal charge. The magistrate court's consideration of either selective prosecution or vindictive prosecution as a defense to the charge of failure to obey a lawful order is clear error for which no adequate remedy other than mandamus exists. Although the government has a statutory right to appeal the dismissal of criminal charges under 18 U.S.C. § 3731, the availability of that remedy has been infringed by the USMJ's decision to consider selective and/or vindictive prosecution as a trial defense after jeopardy attached, rather than as a pretrial challenge to the constitutionality of the prosecution. Because the government's right to mandamus relief is "clear and indisputable" and "no other adequate means to attain the relief exist[s]," In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (internal quotations and citations omitted), the government requests this Court to order the magistrate court to: (1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order; (2) preclude any further evidence in support of a claim of selective or vindictive prosecution at trial; (3) deny as waived any motion to dismiss that the defense may file mid-trial or post-trial based on selective or vindictive prosecution; and (4) refrain from sua sponte consideration of dismissal based on selective or vindictive prosecution either mid-trial or post-trial.

### **JURISDICTION**

This Court has jurisdiction over the government's petition for writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 (2011). Additionally, where the writ is sought with regard to a ruling of a magistrate court, it is the procedural practice in this jurisdiction as well as others to file the petition in the District Court. See Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (considering appeal from district court's denial of petition for writ of mandamus to magistrate judge); U.S. v. Lee, 786 F.2d 951 (9th Cir. 1986) (same).

## **STATEMENT OF FACTS**

At approximately 12:45 p.m., on November 15, 2010, in the area of Lafayette Park and the 1600 block of Pennsylvania Avenue, N.W., Washington, D.C., defendant and 12 other individuals, who were dressed in civilian clothes and Army, Navy, and Air Force military uniforms, formed a group on the north side of Lafayette Park. Lafayette Park is located between the 1600 block of H Street, N.W. and Pennsylvania, Avenue, N.W., north of the White House. The individuals walked in pairs side by side through Lafayette Park, crossed Pennsylvania Avenue, and continued to walk onto the White House sidewalk. The individuals then stepped up onto the masonry base at the bottom of the White House fence and each affixed himself or herself with metal handcuffs to the White House fence, forming a single line across the center of the White House fence. After each was affixed to the White House fence, U.S. Park Police (U.S.P.P.) officers closed the White House sidewalk with police line tape, securing the center portion of the White House sidewalk.<sup>4</sup>

Then, using a loudspeaker, Lieutenant LaChance, of the U.S.P.P., gave verbal warnings. He informed the group that it was violating the regulations applicable to the White House sidewalk and ordered the group to leave. Lieutenant LaChance stated that if they failed to leave the area, the members of the group would be arrested. To ensure that all of the members of the group were in a position to hear the warnings, a U.S.P.P. officer was assigned to the east and west ends of the line the defendants formed. Lieutenant LaChance, with a loudspeaker, stated the warnings three times successively in three minute intervals. Each officer posted at either end of the group indicated that

---

<sup>4</sup> U.S. Park Police officers have the legal authority to maintain law and order and protect persons and property within areas of the National Park System. The White House and its grounds have been part of the National Park System in Washington, D.C., since 1933. D.C. Code §§ 5-201, 10-104.

he could hear the warnings. None of the members of the group who were affixed to the fence attempted to comply with Lieutenant LaChance's order. U.S.P.P. officers allowed additional time to elapse to determine if any member of the group was going to comply with the order. The members of the group remained affixed to the fence.

During the demonstration, the members of the group chanted. There was one individual from the group who was not affixed to the fence. He had a bull horn and was speaking simultaneously with the others who were demonstrating. They engaged in this conduct to protest the United States military's "Don't Ask, Don't Tell" policy regarding a military service person's sexual orientation. The group chanted phrases such as "I am somebody," "I was court marshaled," "I represent all of those who were court marshaled for being who they are," "Where's the change, Mr. Obama, stand up." Additionally, when prompted by the individual with the bull horn, each member of the group stated his/her name and rank.

After it became apparent that the members of the group had no intention of complying with Lieutenant LaChance's order, U.S.P.P. officers, equipped with bolt cutters, began to separate each person from the White House fence by cutting each set of handcuffs. As this was done, each member of the group refused to comply with the arrest procedure and refused to walk from the masonry base to the processing area. As a result, the officers assisted some of the members of the group by preventing them from hitting the ground and injuring themselves. Other officers had to carry some of the members of the group from the masonry base to the processing area. They were arrested for failure to obey a lawful order, in violation of 36 C.F.R. § 2.32(a)(2). Each member of the group was taken into custody and transported to the U.S.P.P. District 5 Substation, where each was positively identified by an arresting officer. The members of the group were detained until it



was determined that they would be released to return to court for an initial appearance on a later date. The U.S.P.P. issued each defendant a violation notice for failure to obey a lawful order, pursuant to 36 C.F.R. § 2.32(a)(2), with a mandatory court appearance of December 15, 2010.

### **PROCEDURAL HISTORY**

Shortly after the protestors' arrests on November 15, 2010, government counsel was contacted by defense counsel Mark Goldstone, Esq., who stated that he, along with Ann Wilcox, Esq., represented all 13 defendants, and he was interested in resolving the case. The parties discussed continuing the initial appearance, which was set for December 15, 2010, in order to pursue a resolution. To facilitate this, on November 30, 2010, the government filed a criminal complaint, joining all defendants as co-defendants and charging them with failure to obey a lawful order, pursuant to the Code of Federal Regulations (C.F.R.) (App. B). On December 2, 2010, to correct an error in the C.F.R. citation, the government filed an amended criminal complaint (App. C). On December 8, 2010, based upon the above conversation with defense counsel, the parties filed a joint motion to continue the initial appearance, requesting that the initial appearance be converted to a status hearing. The magistrate court granted the motion and converted the initial appearance to a status hearing to discuss a mutually convenient date for the parties and the magistrate court. On December 15, 2010, the case was continued to March 18, 2011.<sup>5</sup>

On March 18, 2011, the case was called for an initial appearance. All defendants, except Ian Finkenbinder, appeared with defense counsel Mark Goldstone and Ann Wilcox. Each defendant was arraigned and pled not guilty. Because Mr. Goldstone and Ms. Wilcox stated that they jointly

---

<sup>5</sup> Defense counsel and the government agreed that the defendants' presence could be waived for the status hearing.

represented all defendants, the government, prior to the hearing, filed a motion requesting that the magistrate court conduct an inquiry pursuant to Rule 44 of the Federal Rules of Criminal Procedure (Right to and Appointment of Counsel). Pursuant to that motion, the magistrate court conducted a Rule 44 inquiry, and each defendant waived his or her right to single representation and consented to joint representation. Defense counsel Goldstone informed the magistrate court that the government and his clients had come to an impasse regarding whether the case could be resolved before trial. The magistrate court encouraged the government to consider offering the defendants the opportunity to plead guilty to disorderly conduct pursuant to the D.C. Code. The magistrate court recessed, and during this recess, the government consulted with U.S. Attorney's Office and D.C. Office of Attorney General management personnel, and it was determined that the government, based upon the facts known to it at that time, could not agree that the facts supported a charge of disorderly conduct under the D.C. Code. The government agreed to continue its efforts to reach a pretrial resolution. The magistrate court placed each defendant on personal recognizance and ordered them all to return on May 17, 2011, for a status hearing. In the meantime, government counsel and defense counsel Goldstone and Wilcox worked diligently to come to a mutual agreement regarding a plea offer. These efforts included considering whether the defendants could plead guilty to a violation of the D.C. Municipal Regulations or the D.C. Code, or to an offense pursuant to the Code of Federal Regulations. In April 2011, the parties reached a resolution. The government offered a deferred-sentencing agreement (DSA) to all 13 defendants. Specifically, the government agreed to dismiss the case if the defendants pleaded guilty to failure to obey a lawful order and complied with two conditions during a four-month period: (1) refrain from being arrested upon probable cause and (2) comply with all conditions set by the magistrate court. Via email, defense

counsel informed the government that all defendants, including defendant Choi, had accepted the DSA offer.

On May 10, 2011,<sup>6</sup> each defendant, except defendant Daniel Choi, pleaded guilty to failure to obey a lawful order pursuant to a DSA with the government.<sup>7</sup> Defendant Choi appeared with new counsel, Yetta Kurland for Christopher Lynn, and did not enter a DSA. The magistrate court granted an oral motion by Mr. Goldstone and Ms. Wilcox to withdraw as defendant Choi's counsel. The magistrate court set a status date for June 14, 2011, to allow new defense counsel an opportunity to enter his notice of appearance and discuss a mutually agreeable trial date. On June 14, 2011, the case was called for status, and the parties selected a trial date of August 29, 2011. Defendant Choi was continued on personal recognizance and ordered to return to court on the next date.

In the process of preparing for trial, government counsel began to prepare discovery and noticed that defense counsel Lynn had not made a formal request for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure. On July 6, 2011, to clarify the issue, government counsel emailed Mr. Lynn requesting that he simply respond to her email with a formal request for Rule 16 discovery to satisfy the requirements of Rule 16. Mr. Lynn, on behalf of Mr. Choi, responded that Mr. Choi "deliberately did not file any pretrial motions in this matter" (App. D). Despite this apparent strategic decision, the government provided discovery on August 12, 2011, via email and Federal Express (App. E). On August 16, 2011, defense counsel Lynn acknowledged that

---

<sup>6</sup> Defense counsel Goldstone mistakenly told the defendants the case was set for May 10, 2011, instead of May 17, 2011. USMJ Facciola was not available on May 10, 2011. Due to his unavailability, he made arrangements with USMJ Kay to conduct the status hearing.

<sup>7</sup> As noted above, the government is today moving to dismiss the cases of the 12 other protestors, each defendant having successfully complied with the terms of his or her DSA.

he had received the video of the alleged events (App. F). Then, on August 22, 2011, undersigned counsel received an email from Mr. Lynn, informing the government that two new attorneys, Robert Feldman, Esq. and Norm Kent, Esq., would enter their appearances on behalf of Mr. Choi (App. G). Mr. Lynn, in a voice-mail message, further elaborated on why Mr. Choi selected new counsel. Mr. Lynn stated that he was “out of the case” because Mr. Choi disagreed with his strategy to move to dismiss the case based upon a Speedy Trial Act (STA) violation.<sup>8</sup>

On August 24, 2011, in a telephone conversation with government counsel, Mr. Feldman stated that he was planning to introduce at trial photographs of individuals in front of the White House celebrating the death of Osama bin Laden.<sup>9</sup> When undersigned counsel raised questions about their authenticity and inquired about their relevance, Mr. Feldman stated that the defendant would be claiming that the government selectively prosecuted him because of his sexual orientation and his Anti-Obama perspective.<sup>10</sup> On August 25, 2011, at the request of defense counsel, the case was called for a status conference before U.S. Magistrate Judge Facciola. The defendant was not present, and defense counsel appeared via telephone. Addressing the issue of the White House photographs, the magistrate court took judicial notice of the fact that the building depicted in the photographs was the White House, and ruled that the photographs therefore would be considered

---

<sup>8</sup> In his August 22, 2011, email, Mr. Lynn alluded to this strategy. He asked government counsel if she would concede an STA violation, implying the case was set for trial outside the alleged required 70-day time period (App. G).

<sup>9</sup> In this conversation, Mr. Feldman described the photographs and promised to email them to the government. However, the government did not receive any photographs via email. Mr. Feldman delivered the photographs directly to the magistrate court’s chambers. The government received a copy in court from the law clerk on August 25, 2011.

<sup>10</sup> Before this conversation, the government had not received any notification, oral or written, that the defendant intended to advance a claim of selective prosecution.

authenticated, but also ruled that the government could argue that the photographs were irrelevant (8/25/11 Tr. 6-7). The prosecutor then noted that, pursuant to Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure, to pursue a claim of selective prosecution, the defense was required to file a pretrial motion (*id.* at 7). The USMJ responded, “. . . [y]our objection will be reserved, and . . . I will consider it when I try the case” (*id.* at 7). Later during the status hearing, when the government returned to the selective-prosecution issue, inquiring whether the parties would litigate it, the USMJ stated “I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these demonstrators, the government is engaging in selective prosecution in violation of the Fifth Amendment” (*id.* at 10-11).

On Friday, August 26, 2011, government counsel contacted Mr. Feldman to discuss a possible disposition of the case. In two telephone conversations and an email, the government extended the following deferred-prosecution offer: if the defendant, for a period of four months, agreed to: (1) refrain from being arrested upon probable cause, and (2) comply with all release conditions set by the magistrate court, the government would dismiss the complaint. Through counsel, the defendant declined the offer.

On August 28, 2011, the government filed a motion in limine asking the magistrate court to limit the scope of testimony and evidence regarding the subject matter of the protest, preclude a claim of selective prosecution, and preclude the defense of impossibility (App. A). Relying on United States v. Armstrong, 517 U.S. 456 (1996), and United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983), the government argued in its motion that selective prosecution is not a defense, but a challenge to the constitutionality of the prosecution, and, as such, must be brought by pretrial motion to dismiss the complaint under Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure

(App. A, at 7-8). The government further argued that, because the defendant failed to file a pretrial motion to dismiss the complaint, the issue was waived under Rule 12(b)(3)(E) (id. at 8). Because selective prosecution is not a defense, and relates to an issue of law independent of the guilt of the accused, the government argued that Choi should be prohibited from introducing evidence of selective prosecution at trial (id. at 7-8). The government also argued that the defendant's proffered photographs of people celebrating outside the White House after Osama bin Laden's death did not support a claim of selective prosecution (id. at 9-10).

The case was set for trial on Monday, August 29, 2011. When the USMJ took the bench that morning, without addressing the government's motion, he directed government counsel to "call your first witness" (8/29/11 a.m. Tr. 4). Government counsel asked if the magistrate court would resolve the motion in limine before proceeding to trial, (id. at 4), and pointed out that, in addition to the request to preclude an impossibility defense, the motion also sought to preclude evidence of selective prosecution (id. at 5). The following exchange then occurred:

THE COURT: I saw [the motion in limine] for a few moments when I read it, but – all right, as I understood it, you were objecting, as you did on the telephone conversation we had last week, that any claim of selective prosecution was insufficient, as a matter of law, because you can't show he was singled out upon a basis that falls within the scope of the 5<sup>th</sup> and 14<sup>th</sup> Amendments.

Now, that would go to his defense, right?

MS. GEORGE: No. Actually, Your Honor, the case law indicates that it is not a defense.

THE COURT: That's what I'm saying. But unless and until we get to your making out a prima facie case of his guilt, why are his defenses at all relevant at this point in the process?

MS. GEORGE: Because the claim of selective prosecution is not a defense at all.

THE COURT: He will get to that when he gets to his defenses. You have to prove him guilty first.

MS. GEORGE: Yes, Your Honor, but the motion addresses whether defense counsel can ask questions in the government's case --

THE COURT: Why don't you wait until the questions are asked so we can have it in context?

MS. GEORGE: The defense has already said he wants to ask the questions.

THE COURT: I asked you to call the first witness.

MS. GEORGE: Can I have a little indulgence?

THE COURT: Not now. No, you can't. We'll get to it when we get to it. Please call your first witness. (8/29/11 a.m. Tr. 5-6.)

During the trial, the defense was permitted to cross-examine government witnesses regarding the selective-prosecution claim he alluded to pretrial, but never established that defendant Choi had been treated differently from other similarly situated individuals. See, e.g., 8/29/11 p.m. Tr. 30-32 (questioning Lieutenant LaChance about whether anyone was arrested at the White House on the night that the President announced that Osama bin Ladin was dead); 8/29/11 p.m. Tr. 55-58 (questioning Lieutenant LaChance about Choi's arrest a week before trial for protesting in front of the White House with a group of environmentalists opposed to an oil pipeline, for which he was issued a summons to appear in Superior Court, and asking, at 58, "So, let me get this straight. Through environmental stuff, these guys get a ticket, but for gay stuff, they have to go through the system and face federal charges and up to six months in jail, true or false?"); 8/29/11 p.m. Tr. 69 (questioning Lieutenant LaChance about whether the U.S.P.P. arrested a lady in red, who appeared on the video of the arrest of the DADT protestors, but was not with the protestors and was outside the perimeter established by the U.S.P.P., using an amplification device to talk about "Jesus," and

arguing in response to the government's relevance objection, that it was relevant "to selective prosecution"); 8/29/11 p.m. Tr. 93 (asking U.S.P.P. Officer Michael Fermaint, who was involved in the arrest of the protestors on November 15, 2010, how many protest arrests he had been involved in; USMJ following up by asking whether officer had ever been in a situation where a demonstration led to arrests prosecuted in Superior Court and not federal court); 8/29/11 p.m. Tr. 134 (asking U.S.P.P. Jerome Stoudamire, who was involved in the arrest of the protestors on November 15, 2010, out of all of the arrests of protestors in which he had participated, how many were prosecuted in federal court). Defense counsel was also permitted to ask U.S.P.P. officers called in the defense case questions related to selective prosecution. See 8/31/11 a.m. Tr. 37 (asking U.S.P.P. Captain Philip Beck why the instant case was not prosecuted in Superior Court); 8/31/11 p.m. Tr. 41-42, 45 (asking Captain Beck about an arrest of a woman for dousing herself with gasoline, and about the rally the night that Osama Bin Laden was killed).

At times, the USMJ himself asked questions related to a selective-prosecution or vindictive-prosecution claim. See, e.g., 8/29/11 p.m. Tr. 57 (asking Lieutenant LaChance about the nature of the protest the week before trial, during which protestors were arrested and issued a summons to appear in Superior Court); 8/29/11 p.m. Tr. 84 (asking USPP Officer Fermaint what he was told in advance about the demonstrators, and explaining, "I want to see the selective prosecution question."); 8/31/11 a.m. Tr. 37-38 (questioning U.S.P.P. Captain Beck about who made the decision to prosecute Choi in Superior Court in March and April).<sup>11</sup> The USMJ also continued to indicate that he would allow the defendant to argue selective prosecution as a defense to the charge against him.

---

<sup>11</sup> Captain Beck testified that the D.C. Attorney General's Office, and not the U.S. Attorney's Office, made the charging decisions in March and April because Choi was charged with a violation of the D.C. Municipal Regulations (8/31/11 a.m. Tr. 38)



See 8/29/11 p.m. Tr. 133 (explaining that after the government rests, “the Defendant will decide whether to present the defense of these charges or otherwise try to defend himself. He may choose selective prosecution, he may deny his guilt, he may choose whatever defense he wishes to.”)

During the defense case, Choi testified that he had been arrested for DADT protests in March and April of 2010, that he had appeared in “Municipal Court,” and that he had been ordered to stay away from the White House (8/31/11 a.m. Tr. 63).

At the beginning of the third day of trial, while in the defense case, the magistrate court addressed a “Motion to Compel Production,” filed by Choi’s counsel the previous night (App. H). The motion asserted, as grounds for the requested discovery that “the defendant . . . has asserted that the government may have acted vindictively and with animus towards the above named Defendant” (App. H at ¶ 3); and “[t]hat to prove a claim of selective prosecution the Defendant is prepared to show that other protestors on the White House sidewalk, similarly situated, have been disparately treated” (App. H at ¶ 4). The motion sought production of email communications between the U.S. Secret Service and the U.S. Park Police advising the Park Police that there was going to be a demonstration at which people were planning to chain themselves to the White House fence (App. H at ¶ 11 ; 8/29/11 a.m. Tr. at 49-52).<sup>12</sup> The motion asserted that this email and others “may be probative of the defendant’s theory of this case, to wit, that he may have been selectively targeted

---

<sup>12</sup> The email, marked for identification as government’s exhibit 24, but not introduced into evidence, had been mentioned during direct examination of Lieutenant LaChance, the Park Police officer who was assigned as SWAT commander on November 15, 2010 (8/29/11 a.m. Tr. 47). When asked if he had received information that there was going to be a demonstration at the White House that day, LaChance testified that he had received an email from the Secret Service advising him that the demonstration would involve people who were going to chain themselves to the White House fence (*id.* at 49-52). Based on this information, LaChance reported to the White House sidewalk (*id.* at 53). The email mentioned by Lieutenant LaChance is included in the Appendix at Tab I.

due to bad faith, ill will of government agents extending from the arresting officers of the US Park Police to the Secret Service to representatives of the President of the United States” (App. H at ¶ 9). After announcing that he would give the government time to oppose the motion, the USMJ told government counsel that he “just had a thought that [he] would appreciate if [she] would convey to the people in the U.S. Attorney’s Office” (8/31/11 a.m. Tr. 8). The USMJ then stated, “I believe that a prima facie case of selective prosecution has been made out, and this material under Rule 16 is relevant, but now the question becomes what, if any, privileges you intend to assert” (*id.*).<sup>10</sup> Later in the day, the USMJ elaborated:

At the end of these proceedings, assuming they ever end, I’m going to ask for briefs from both sides so we can shape the issues, and Mr. Kent can speak for his client, but as I understand Lieutenant [Choi’s] testimony, it was that, not that other people who demonstrated about whales or environmental issues or anything else. His claim of selective prosecution is that after I did something in March and I did it in April, they began to form the decision to treat me radically different in November. They did that to punish me for the expression of my First Amendment rights, and therefore that was to be selectively prosecuted, to be vindictively prosecuted because of the content of what I was saying. (8/31/11 a.m. Tr. 67.)

After a break for government counsel to confer with others in the U.S. Attorney’s Office, the proceedings recommenced and government counsel asked if the magistrate court would clarify whether it was considering selective or vindictive prosecution as a theory of defense, and was going to allow the defense to proceed as if it was a theory of defense, or whether the magistrate court was contemplating considering a motion to dismiss at the end of the government’s case (8/31/11 p.m. Tr.

---

<sup>10</sup> The magistrate court’s reference to Rule 16 was erroneous. In United States v. Armstrong, 517 U.S. 456, 463 (1996), the Supreme Court held that Rule 16 governs discovery of documents material to the preparation of a defense against the government’s case, but not to the preparation of a selective-prosecution claim. To obtain discovery in preparation of a selective-prosecution claim, a defendant must produce some evidence that similarly situated defendants of other races, religions, or other arbitrary classifications could have been prosecuted, but were not. *Id.* at 469.

2). The USMJ responded:

The issue presented by the testimony of the defendant yesterday in my view creates a prima facie case for the proposition that the difference in the manner in which he was prosecuted for his behavior in November as opposed to his behavior in March and April would permit the inference that that difference was a function of the nature of his speech or what he said.

It would then follow that the difference in treatment would (a) violate the due process clause because it is vindictive; and (b) independently constitute a violation of the First Amendment because it is predicated on his speech. I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions. (8/31/11 p.m. Tr. 2-3.)

Again seeking clarification, government counsel asked if the defense was going to be allowed to pursue the theory posited by the magistrate court as a theory of defense, and the USMJ responded “[y]es” (8/31 p.m. Tr. 3). Government counsel argued that the defense should not be allowed to pursue vindictive prosecution as a defense on the merits (*id.* 4), and, when asked by the USMJ how the government was prejudiced, responded that vindictive prosecution is a claim that there is a constitutional infirmity in the decision the government made to prosecute, which should be handled in a separate hearing and, if the magistrate court concludes that the prosecution is vindictive, should result in the dismissal of the case (*id.* at 5-6). The USMJ then acknowledged that, if the issue had been addressed pretrial, and the magistrate court had dismissed the complaint on the grounds of vindictive prosecution, the government would have been able to appeal the dismissal (*id.* at 6). The USMJ further acknowledged that the government only became aware of the potential argument during the pretrial phone call with the defense counsel, but then suggested that the government “could have at that point asked me, because selective prosecution was raised, to continue the proceeding so that issue could be addressed. But we all went forward. I don’t know how else we could have done what we did.” (*Id.* at 6-7.) The government made two points in response: first, that

the first time vindictive prosecution was raised was when it was raised by the magistrate court that morning, and second, that the government preserved its position on selective prosecution when it filed the motion in limine (*id.* at 7-8). Recognizing that jeopardy had attached, the USMJ asked if the government wished the magistrate court to stop the proceeding so the government could seek mandamus, and government counsel responded affirmatively (*id.* at 8). The USMJ granted the government's request to stay the proceedings, denied an oral defense motion to dismiss the case under Rule 48(b)(3), and gave the government 10 days within which to file a written petition for writ of mandamus (*id.* at 18). Defendant remains on personal recognizance.

### **SUMMARY OF ARGUMENT**

The magistrate court's failure to rule on the government's motion in limine regarding selective prosecution, and its consideration of selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order, are contrary to Rule 12 of the Federal Rules of Criminal Procedure and controlling federal case law, and are thus clear errors for which no adequate remedy other than mandamus exists. Although the government has a statutory right to appeal the dismissal of criminal charges under 18 U.S.C. § 3731, the availability of that remedy has been infringed by the magistrate court's decision to consider selective and/or vindictive prosecution as a trial defense, rather than as a pretrial challenge to the constitutionality of the prosecution. Because the government's right to mandamus relief is "clear and indisputable" and "no other adequate means to attain the relief exist," *In re: Sealed Case*, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (internal quotations and citations omitted), the government requests this Court to order the magistrate court to: (1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order; (2) preclude any further evidence in support of a claim of selective or vindictive

prosecution at trial; (3) deny as waived any motion to dismiss that the defense may file mid-trial or post-trial based on selective or vindictive prosecution; and (4) refrain from sua sponte consideration of dismissal based on selective or vindictive prosecution either mid-trial or post-trial.

## **ARGUMENT**

### **WRIT OF MANDAMUS LEGAL STANDARD**

The writ of mandamus has been described as “an extraordinary remedy, to be reserved for extraordinary circumstances.” Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Mandamus will issue if the petitioner establishes that: (1) the right to issuance of the writ is “‘clear and indisputable,’” In re Sealed Case, 151 F.3d at 1063 (quoting Gulfstream, 485 U.S. at 289), and (2) “‘no other adequate means to attain the relief’ exist.” Id. (quoting Allied Chem. Corp. v. Daiiflon, Inc., 449 U.S. 33, 35 (1980)).

#### **THE MAGISTRATE COURT ERRED BY FAILING TO RESOLVE THE GOVERNMENT’S MOTION IN LIMINE BEFORE TRIAL AND BY CONSIDERING THE CLAIMS OF SELECTIVE AND VINDICTIVE PROSECUTION AS TRIAL DEFENSES.**

**A. Selective prosecution and vindictive prosecution are not defenses to a criminal charge, and must be brought by pretrial motion absent exceptional circumstances.**

“A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” United States v. Armstrong, 517 U.S. 456, 463 (1996). Similarly, a vindictive prosecution claim is not a defense to the merits of a charged offense because it also is a claim that the prosecutor has violated the defendant’s constitutional rights by the institution of the prosecution. U.S. v. (Jerry) Jarrett, 447 F.3d 520, 525 (7<sup>th</sup> Cir.) (quoting Armstrong, 517 U.S. at 463 (1996)),

cert. denied, 549 U.S. 1043 (2006). Both selective-prosecution claims and vindictive-prosecution claims “relate[] to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged.” United States v. Washington, 705 F.2d 489, 495 (D.C. Cir. 1983).

A selective-prosecution claim asks the court to exercise judicial power over the prosecutor’s otherwise broad discretion to enforce the nation’s criminal laws based on a claim that the prosecution violates the equal protection component of the Due Process Clause of the Fifth Amendment. Armstrong, 517 U.S. at 464. See also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion”). A selective-prosecution claimant must demonstrate that the federal prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.” Id. at 465 (quotation and citation omitted).

A vindictive-prosecution claim asks the court to preclude, as a matter of due process, action by a prosecutor that “is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution.” United States v. Safavian, 2011 WL 1812348 \*3 (D.C. Cir. 2011) (quoting Maddox v. Elzie, 238 F.3d 437, 446 (D.C. Cir.), cert. denied, 534 U.S. 836 (2001)). To prove prosecutorial vindictiveness, a defendant must submit either “(i) evidence of the prosecutor’s actual vindictiveness or (ii) evidence sufficient to establish a ‘realistic likelihood of vindictiveness,’ thereby raising a presumption the Government must rebut with objective evidence justifying its action.” Id. (quoting United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). If a defendant is successful in convincing a court that the government engaged

in selective or vindictive prosecution, violating his due process rights, then the charging document should be dismissed.

Permitting a defendant to present selective prosecution or vindictive prosecution as a trial defense to the charged crime is legal error. Evidence of selective or vindictive prosecution is irrelevant to the elements of the charged offense. See Washington, 705 F.2d at 495 (rejecting claim that selective prosecution should have been decided by jury and not by trial court); (Jerry) Jarrett, 447 F.3d at 525 (reversing district court's dismissal of indictment based on prosecutorial vindictiveness after de novo review). Evidence that the prosecutor has unconstitutionally initiated the prosecution does not bear on the credibility of the fact witnesses or the weight of the evidence. It does not tend to prove or disprove whether the defendant committed the charged crime. See United States v. Lopez, 854 F. Supp. 57, 60 (D.P.R. 1994) (evidence alleged in defendant's motion claiming selective prosecution "has no bearing whatsoever on whether the defendant committed the crimes alleged, and will not be allowed at trial").

Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure states that "a motion alleging a defect in instituting the prosecution" "must be raised before trial." A motion required to be made before trial under Rule 12(b)(3) is waived unless, for good cause shown, the court grants relief from the waiver. Fed. R. Crim. P. 12(e). Because a selective- or vindictive-prosecution claim alleges "a defect in instituting the prosecution," Fed. R. Crim. P. 12(b)(3)(A), it must be raised by motion before trial or it is waived. See U.S. v. Gary, 74 F.3d 304, 313 (1<sup>st</sup> Cir.) (absent "exceptional circumstances," "a claim of selective prosecution that is not raised prior to trial is deemed waived"), cert. denied, 518 U.S. 1026 (1996); U.S. v. Taylor, 562 F.2d 1345, 1356 (2<sup>nd</sup> Cir.) (selective-prosecution claim made after five weeks of trial untimely because it alleged a defect in the institution

of the prosecution, which must be raised before trial under Rule 12), cert. denied, 432 U.S. 909 (1977); (Ronald) Jarrett v. United States, 822 F.2d 1438, 1442 (7<sup>th</sup> Cir. 1987) (Rule 12(b) requires motions alleging selective or vindictive prosecution to be made pretrial or they will be deemed waived; reviewing whether trial counsel was ineffective for failing to file pretrial motion; and concluding there was no ineffectiveness because any such motion lacked merit).

Defendant Choi did not file a pretrial motion alleging selective or vindictive prosecution, nor has he filed such a motion during the trial. The defendant has known, at least as early as August 24, 2011, when he raised the issue in a telephone call with government counsel, that he intended to raise a selective-prosecution claim. He has also known since November 30, 2010, when the government filed a criminal complaint, that he was being prosecuted for his actions on November 15, 2010, even though he had not been prosecuted for similar actions in March and April 2010. Yet he failed to comply with Rule 12 by filing a pretrial motion alleging either selective or vindictive prosecution. Even if the Motion to Compel could be considered a motion to dismiss the indictment on either ground, it is untimely. The defendant waived his right to raise selective- or vindictive-prosecution claims by failing to comply with Rule 12. Gary, 74 F.3d at 313. He should not have been permitted by the magistrate court to avoid the rule's requirements by asserting the claims as trial defenses.

A plain reading of Rule 12(b)(3)(A) reveals that one of its primary goals is to enable the court to resolve challenges to the constitutionality of the prosecution before trial. Because a selective- or vindictive-prosecution claim challenges the broad discretion of the Attorney General and United States Attorneys, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” Armstrong, 517 U.S. at 464 (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)). This is a “demanding” standard, id. at 463,



and the Supreme Court has established a likewise demanding standard to obtain discovery in support of such a claim. *Id.* at 468 (“The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.”); *id.* at 470 (requiring some evidence that similarly situated defendants could have been prosecuted, but were not, based on race, religion, or other arbitrary classification, before discovery may be ordered). Thus, as Supreme Court precedent and Rule 12(b)(3)(A) contemplate, a successful claim of selective or vindictive prosecution must be brought to the court’s attention pretrial so that it can be fully developed – through discovery and an evidentiary hearing, if warranted – and ruled upon before putting the defendant in jeopardy.

In this case, the United States had only vague notice, provided during a telephone call, of the gravamen of the defendant’s claim. When no pretrial motion to dismiss the complaint was filed, and no discovery requested, the government became concerned that the defendant intended to raise the issue at trial as a defense to the charge of failure to obey a lawful order. That is why the government filed the motion in limine, but the magistrate court refused to consider the motion, and instead directed the government to begin presenting its trial evidence, thus causing jeopardy to attach. The magistrate court’s later confirmation that it would consider selective prosecution (recharacterized by the magistrate court as vindictive prosecution) as a defense to the charge of failure to obey an unlawful order was clearly erroneous.

**B. The United States will be irreparably harmed if the magistrate court acquits the defendant on the basis of selective or vindictive prosecution, thereby depriving the government of its statutory appellate rights.**

Under 18 U.S.C. § 3731, the government has a statutory right to appeal the dismissal of

criminal charges. It has no such right to appeal an acquittal. See Yeager v. United States, 129 S. Ct. 2360, 2366 (2009) (Double Jeopardy Clause precludes government from relitigating any issue necessarily decided by factfinder's acquittal in prior trial). Although we do not believe there is any merit to the vindictive-prosecution claim, if the magistrate court considers vindictive prosecution as a defense to the charge of failure to obey a lawful order – as it has indicated it will – an acquittal on that ground would preclude the government from exercising its statutory right to appellate review. For that reason, there is “no other adequate means” by which the government may obtain relief from the magistrate court’s error, other than mandamus. In re Sealed Case, 151 F.3d at 1063.

Moreover, by failing to rule on the government’s motion in limine, and allowing the defendant to elicit evidence that he claims supports a “defense” of selective or vindictive prosecution, the magistrate court has severely hampered the government’s ability to rebut these claims. As we discussed above, claims of selective or vindictive prosecution should be brought by pretrial motion. In this way, the filing of a motion gives the government notice of the claim, and allows for full development of the claim if the defendant can make the requisite showing. In the case of a selective-prosecution claim, the defendant must show clear evidence that the prosecutorial policy “had a discriminatory effect and was motivated by a discriminatory purpose.” Armstrong, 517 U.S. at 465 (quotation and citation omitted). To establish a discriminatory effect, the defendant must show that similarly situated individuals were not prosecuted based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” Oyler v. Boles, 368 U.S. 448, 456 (1962).<sup>11</sup>

---

<sup>11</sup> The defendant’s selective-prosecution claim, as alluded to in his August 24, 2010, telephone conversation with government counsel, the pretrial status conference on August 25, 2010, and the Motion to Compel, is not based on race, but on a claim “that other protestors on the White House sidewalk, similarly situated, have been disparately treated” (App. H at ¶ 4). The defendant has not, however, proffered any evidence that other protestors who have handcuffed themselves to

The defendant's failure to file a motion or make this showing has made it difficult for the United States to ascertain what witnesses or other evidence (including, potentially, prosecution data) it may need to gather and present to rebut the defendant's vague claims. In the case of vindictive prosecution, the government is similarly disadvantaged, particularly because the "prima facie" case described by the magistrate court does not appear to fall within the scope of the vindictive-prosecution doctrine. See Maddox, 238 F.3d at 446 ("In the prosecutorial context, the doctrine precludes action by a prosecutor that is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution."). A proper pretrial motion would have avoided putting the government in the position of defending against a moving target, created by the defense and the magistrate court positing new theories as the case proceeded.

The magistrate court's announcement that it will consider selective or vindictive prosecution as a defense to the charge in this case is clear error that could irreparably harm the United States if the magistrate court were to acquit the defendant on either basis, thereby depriving the United States of its right to appeal. Such a finding also could cause irreparable damage to the reputation of the United States Attorney's Office, as it would directly attack the very integrity of the institution. Where there is no merit to either the selective- or vindictive-prosecution theories, the risk of such irreparable harm is clearly unwarranted.

**C. No exceptional circumstances exist that would warrant relief from Rule 12(b)(3)(A)'s requirements**

Under Rule 12(e), a party waives any Rule 12(b)(3) motion if not made before trial, unless, for good cause shown, the court grants relief from the waiver. See Gary, 74 F.3d at 313 (absent

---

the White House fence have been disparately treated.

“exceptional circumstances,” claim of selective prosecution not raised pretrial is waived); (Ronald Jarrett, 822 F.2d at 1441 (mid-trial motion based on selective and vindictive prosecution waived where defendant failed to establish sufficient cause for court to excuse delay). Although defendant Choi still has filed no motion to dismiss, the magistrate court raised the claim of vindictive prosecution sua sponte. Because there is no good cause to excuse the failure of the defense to raise this claim pretrial, the magistrate court should not be permitted to consider it mid-trial, or post-trial, either based on a belated motion to dismiss that Choi may file, or sua sponte.

The USMJ indicated that it was “compelled to rule on the issues of law that emerge” (8/31/11 p.m. Tr. 5), and that he “only began to understand the nature of the claim being made [w]hen [he] heard the defendant’s testimony” (*id.* at 7). The magistrate court’s mid-trial recognition of the nature of the defendant’s claim is not an exceptional circumstance that provides good cause for the defendant’s failure to file a pretrial motion based on vindictive prosecution. As the USMJ described the claim – which has never been articulated by the defense – “The defendant’s position is: I said something in March, I said something in April and I said something in November. The reason I was treated in November differently from the March and April is, by November, I began to offend the United States by what I was saying to the point that they treated me differently; and therefore, my rights under the First Amendment and Fifth Amendment were violated.” (8/31/11 p.m. Tr. 14.) Not only does this fail to articulate a claim that the prosecution of Choi was designed to “penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution,” Maddox, 238 F.3d at 446, and notwithstanding that it is well within the bounds of prosecutorial discretion to prosecute someone after that person has been arrested three times for the same conduct in a nine-month period, the magistrate court’s belated recognition of something known

to the defendant all along does not provide an exceptional circumstance that would excuse the Rule 12(e) waiver and warrant consideration of a motion to dismiss for vindictive prosecution either mid-trial or post-trial. There is no dispute that defendant Choi realized on November 30, 2010, when the criminal complaint was filed, that he was being prosecuted for failure to obey a lawful order. He knew at that time that he had not been prosecuted for the same conduct in March and April 2010, when he had been arrested after chaining himself to the White House fence. Everything he needed to know to make the claim now being advanced by the magistrate court was known to defendant Choi well before trial.

Similarly, to the extent that the defendant may intend to move to dismiss the complaint on selective-prosecution grounds, or the magistrate judge may intend to consider such a motion sua sponte, no exceptional circumstances exist to relieve the defendant from failing to file a selective-prosecution motion pretrial. At least as early as August 24, 2010, when defense counsel discussed the potential claim with government counsel, and August 25, 2010, when he brought it up during the pretrial status conference, the defendant knew of the basis for the assertion he later made during trial “that other protestors on the White House sidewalk, similarly situated, have been disparately treated” (App. H at ¶ 4). No cause exists to excuse the defendant from filing a motion to dismiss based on selective prosecution pretrial under Rule 12(b)(3)(A).<sup>12</sup>

---

<sup>12</sup> Application of the waiver rule is particularly warranted in this case, where previous defense counsel asserted that Choi “deliberately did not file any pretrial motions in this matter” (App. D). The defendant should not be afforded a second chance to advance a claim he appears deliberately to have chosen not to make pretrial.

## CONCLUSION

Wherefore, the United States respectfully requests that the district court issue a writ of mandamus to the magistrate court, ordering the magistrate court to:

- (1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order;
- (2) preclude further evidence at trial in support of a claim of selective or vindictive prosecution;
- (3) deny as waived any motion to dismiss based on selective or vindictive prosecution that the defense may file mid-trial or post-trial; and
- (4) refrain from sua sponte considering dismissal based on selective or vindictive prosecution either mid-trial or post-trial.

Respectfully submitted,

RONALD C. MACHEN JR.  
United States Attorney

ROY W. McLEESE III,  
GILBERTO GUERRERO,  
Assistant United States Attorneys

\_\_\_\_\_/s/\_\_\_\_\_  
ANGELA S. GEORGE, DC Bar No. 470-567  
Assistant United States Attorney  
Violent Crimes and Narcotics Trafficking Section  
U.S. Attorney's Office for the District of Columbia  
555 4<sup>th</sup> Street, NW, Rm. 4444  
Washington, DC 20530  
Angela.George@usdoj.gov  
(202) 252-7758

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have caused a copy of the foregoing appendix to be served by electronic means, on this 12th day of September, 2011, through the Court's CM/ECF system, upon Norm Kent, Esquire, Kent and Cormican, PA, 110 SE 6<sup>th</sup> Street, Suite 1970, Ft. Lauderdale, 33301.

\_\_\_\_\_/s/\_\_\_\_\_  
**ANGELA S. GEORGE**  
**Assistant United States Attorney**